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July 7, 2011

VIA EMAIL

Rick Kaplan, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Letter Request for Information from Cellular South, Inc.
WT Docket No. 11-65

Dear Mr. Kaplan:

By letter dated June 14, 2011, I advised Ms. Milkman that Cellular South, Inc. ("Cellular South") could not comply with the Bureau's requests for information and the production of documents in connection with the above-referenced proceeding. I informed Ms. Milkman that Cellular South would respond to the Bureau's discovery requests if it received assurances that the Commission would not assert the response as a waiver of the procedural arguments that Cellular South presented in its petition to deny the applications of AT&T Inc. ("AT&T") and Deutsche Telekom AG ("DT") for Commission consent to the transfer of control of T-Mobile USA ("T-Mobile"). To date, the Commission has provided no such assurances. Therefore, Cellular South must respectfully decline to provide the information that you requested by letter to Messrs. Graham and Nace dated June 27, 2011.

Cellular South objects to the Bureau's attempt to take pre-designation discovery on the grounds that it is inconsistent with the pre-grant procedures required by § 309 of the Communications Act of 1934, as amended ("Act"). The Bureau commenced discovery in this case on May 27, 2011 — *four days before petitions to deny were due to be filed* — by submitting "information and discovery requests" to AT&T and DT. It explained that discovery was initiated so that the Commission could "complete its review of the applications and make the necessary public interest findings" under § 310(d) of the Act. The initiation of hearing procedures prior to the submission of the pleadings was wholly inconsistent with the statutory scheme. It is evident

from the language and legislative history of § 309 that Congress intended that parties in interest have the opportunity to file petitions to deny *before* the Commission can initiate any inquiry into the facts.

Congress conferred standing upon parties in interest to file petitions to deny under § 309(d)(1) "to enable them to convey information bearing on the qualifications of licensees and potential licensees to the Commission." *Faulkner Radio, Inc. v. FCC*, 557 F.2d 866, 875 (D.C. Cir. 1977). In particular, competitors were granted standing, because they were the "most likely to bring an applicant's deficiencies to the Commission's attention." *Id.* (citing *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1101 (D.C. Cir. 1966)).

The pre-grant process mandated by subsections (b) and (d) of § 309 calls for public notice and a 30-day opportunity for petitions to deny to precede processing of the application by the Commission. As was explained when subsections (b) and (d) were enacted in 1960, Congress adopted:

> … a procedure which would authorize a petition to deny to be filed prior to action on the application by the Commission. This would be accomplished by requiring the Commission … to hold applications for not less than 30 days after notice of acceptance for filing of application … has been published. This new "pre-grant" procedure would require the Commission to consider such petitions to deny in connection with its consideration of these applications and, where upon examination of the application and the petition to deny or any other pleadings before it, the Commission is not able to make the public interest findings required, it would designate such application for hearing. We believe that these procedural safeguards will provide an adequate opportunity for proper parties to protect their interests in an orderly and logical manner without subjecting the Commission procedures to the abuses which are inherent in the present protest procedure.

H.R. Rep. No. 86-1800, at 3 (1960) ("House Report"), *reprinted in,* 1960 U.S.C.C.A.N. 3516, 3518.

The language of § 309 plainly provides parties in interest with the opportunity to present specific allegations of fact showing that the grant of an application would be prima facie inconsistent with the public interest before the Commission begins processing the application. First, § 309(b) provides that no application subject to its provisions "shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application." 47 U.S.C. § 309(b). The legislative history of § 309(b) shows that it was "designed specifically to give interested parties an opportunity to learn of the application and to file a 'petition to deny' as provided for by … subsection (d)." House Report at 3, *reprinted in,* 1960 U.S.C.C.A.N. at 3519.

Second, § 309(d)(1) authorizes the filing of petitions to deny within a "30-day waiting period." *WTWV, Inc.*, 45 F.C.C. 2d 664, 665 (1974). It provides in pertinent part as follows:

> Any party in interest may file with the Commission a petition to deny any application … to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that … the Commission from time to time by rule may specify a shorter period (no less than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application …), which shorter period shall be *reasonably related to the time when the applications would normally be reached for processing.*

47 U.S.C. § 309(d)(1) (emphasis added). The purpose of the 30-day waiting provision is to afford "ample opportunity for any party in interest to file a petition to deny *before the application is reached for processing*." House Report at 4, *reprinted in,* 1960 U.S.C.C.A.N. at 3519 (emphasis added).

Finally, § 309(d) provides that petitions to deny "shall contain specific allegations of fact sufficient to show … that a grant of the application would be prima facie inconsistent with [the public interest]," 47 U.S.C. § 309(d)(1), and that the Commission must make its findings "on the basis of the applications, the pleadings filed, or other matters which it may officially notice." *Id*. § 309(d)(2). However, § 309(d) has been construed to allow the Commission to request additional information from an applicant *after* pleadings are filed by the parties. In *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 630 n.34 (D.C. Cir. 1978) (en banc), the court explained the process in the context of a contested renewal proceeding:

> When the FCC concludes from the initial pleadings that a factual uncertainty prevents summary renewal of a license … it generally attempts to resolve the factual uncertainty by requesting further information, rather than by designating the application for an immediate renewal hearing. The … Act permits this course. Section 309(d)(2) and (e) … require the FCC to designate an application for a hearing "(i)f a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with (the public interest, convenience, and necessity)." Yet this section does not require that the FCC make the necessary findings on the basis of the initial pleadings in the license renewal proceeding; it states that the Commission shall make its findings "on the basis of the application, the pleadings filed, or other matters which it may officially notice." The Act expressly permits the FCC to request further information from the licensee. The facts thus generated become part of the licensee's renewal application or are facts that the FCC may officially notice.

The *Bilingual* court also specified that it was § 308(b) of the Act that "expressly permits the FCC to conduct further inquiry if it believes that more information is necessary before it can dispose of a license renewal application." 595 F.2d at 630 n.36. Section 308(b) plainly authorizes the Commission to "require from an applicant … further written statements of fact to enable it to determine whether such original application should be granted or denied." 47 U.S.C. § 308(b). It does not authorize the Commission to require written statements of fact from parties

in interest or non-parties. Consequently, the Bureau claimed that §§ 4(i), 4(j) and 403 of the Act gave it the authority to seek discovery from Cellular South. That claim is unavailing.

Neither § 4(i) nor § 4(j) can override the Commission's duty under § 1 of the Act to execute and enforce the pre-grant procedures specified in § 309 that give parties in interest the opportunity to plead their cases in an orderly fashion before the Commission takes action. As for § 403 of the Act, it provides that the Commission "shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by … petition under any of the provisions of [the Act]." 47 U.S.C. § 403. Thus, by its own terms, § 403 did not grant the Bureau any authority in this case beyond the power conferred by § 309 once petitions to deny were filed.

Discovery is available only once the Commission designates a case for hearing. *See* 47 C.F.R. § 1.311(a) (discovery "procedures may be used in any case of adjudication (as defined in the Administrative Procedure Act ["APA"]) which has been designated for hearing"). *See also Retail Store Employees Union v. FCC*, 436 F.2d 248, 255 n.47 (D.C. Cir. 1970). Thus, once the T-Mobile transfer of control applications are designated for a "full hearing" under § 309(e), 47 U.S.C. § 309(e), and Cellular South is named as a party and intervenes, *see* 47 C.F.R. § 1.221(d) & (e), the Bureau would have the right to serve interrogatories upon, and request documents from, Cellular South. *See id*. §§ 1.323(a) & 1.325(a). Until such time, the Bureau has no such right.

Prior to *Bilingual*, the Commission refused to authorize pre-designation discovery based on its conclusion that "discovery should be used only when relevant to an issue in the hearing as distinguished from merely relevant to an allegation set forth in a petition to deny or complaint." *Rules and Policies to Facilitate Public Participation and Reregulation of the Various Communications Industries in the Public Interest*, 61 F.C.C. 2d 1112, 1127 (1976). The Commission adhered to that decision even in the wake of *Bilingual*. *See Kannapolis Television Co.*, 80 F.C.C. 2d 307, 314-15 (1980). *See also Chesapeake Television, Inc.*, 88 F.C.C. 2d 1711, 1713-14 (Broad. Bur. 1981) (relying in part on § 1.311(a) of the Commission's hearing rules). If parties in interest are not permitted to take discovery prior to designation for hearing, then the Bureau should be prohibited from taking pre-designation discovery with respect to parties in interest.

The pre-designation discovery initiated by the Bureau will disrupt the orderly conduct of this proceeding. That is because "[t]he [APA] and the Due Process Clause of the Constitution generally entitle parties in administrative proceedings to have access to the documents necessary for effective participation in those proceedings." *Open Network Architecture Tariffs of Bell Operating Companies,* 10 FCC Rcd 1619, 1621 (1995). *See Examination of the Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24837 (1998) ("petitioners to deny generally must be afforded access to all information submitted by licensees that bear upon their applications"). Consequently, the *Bilingual* court afforded petitioners to deny a role to play if the Commission elects to obtain additional information from an applicant:

> The full report of the Commission's investigation, including all evidence it receives, must be placed in the public record, and a stated reasonable time allowed for response and rebuttal by petitioners. Those procedures will permit meaningful participation by petitioners without necessitating potentially burdensome discovery.

Bilingual, 595 F.2d at 634. *See Amendment of Subpart H. Part 1 of the Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings,* 2 FCC Rcd 6053, 6054 (1987) ("*Ex Parte Order*"), *modified,* 3 FCC Rcd 3995 (1988). Thus, once it completes its discovery in this case, the Bureau must prepare a report of its investigation for the record that includes all the evidence it collects and states its conclusions. *See* 47 U.S.C. § 404 ("Whenever an investigation shall be made by the Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission"). Then, under *Bilingual*, petitioners must be afforded a reasonable time for response and rebuttal, presumably as would AT&T and DT. Not only will that entail an additional round of pleadings, but a round of pleadings based on a new record developed by the Bureau rather than by the parties.

The Bureau sought discovery from both parties in interest and non-parties on June 6, 2011, two weeks before the end of the pleading cycle that it established for this proceeding. Again, the Bureau's action was inconsistent with the statutory scheme. Because it did not wait for the petitioners to plead their cases, the Bureau obviously did not employ discovery to "obtain[] more information in order to determine whether a petition to deny should be granted." *Ex Parte Order,* 2 FCC Rcd at 6054. Nor did it initiate discovery based on its conclusion that the "initial pleadings" left "factual uncertainty" that prevented the summary grant of the T-Mobile transfer applications. *Bilingual*, 595 F.2d at 630 n.34. Rather, it appears that the Bureau is building a record independently and irrespective of the factual allegations in the petitions to deny.

Cellular South is troubled by the Bureau's explanation that discovery was necessary on June 6, 2011 in order for the Commission to "complete" its review of the T-Mobile transfer applications and to make the "necessary public interest findings." The only public interest findings that the Commission can make under § 309(d)(2) is that "there are no substantial and material questions of fact and that a grant of the application[s] would be consistent with [the public interest]." 47 U.S.C. § 309(d)(2). A hearing would be required "[i]f a substantial and material questions of fact is presented or if the Commission for any reason is unable to find that grant of the application[s] would be consistent with [the public interest]." *Id.* The Bureau's explanation suggests that it has assumed the burden of producing evidence necessary to establish that the grant of the applications would serve the public interest. Certainly, the Bureau is not seeking to discover facts relevant to the factual allegations made by the petitioners since it initiated discovery before the pleadings were filed.

Finally, the procedures employed by the Bureau have put the cart before the horse in this case. Interrogatories and document requests are supposed to be served on parties to discover facts relevant to the issues designated for hearing by the Commission. The Bureau has served

interrogatories and document requests on the applicants, parties in interest, and non-parties alike for the purpose of discovering facts necessary to grant the applications without a hearing. The fact that the Bureau has found it necessary to engage in such extensive discovery proves only that a hearing is necessary in this case under § 309(d)(2) and (e). Cellular South cannot respond to discovery requests that could deprive it of the procedural safeguards guaranteed by § 309.

A copy of this letter will be filed electronically in WT Docket No. 11-65.

If you should have any questions with regard to this matter, please direct them to the undersigned.

Very truly yours,

Russell D. Lukas

cc: Kathy Harris
Kate Matraves
Jim Bird
David Krech
Peter Schildkraut
Kate Dumouchel
Nancy Victory